No. 83-1517

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

DANIEL J. McCARTHY, Director
California Department of Corrections,
and PAUL J. MORRIS, Warden,
California State Prison at Folsom,

Petitioners,

v.

DANIEL L. BRUNO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Is a federal court on habeas corpus required to presume the correctness of factual findings by state trial and appellate courts that prosecutorial misconduct was cured by admonitions and instructions to the jury?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 12, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 721 F.2d 1193 and is attached to this petition as Exhibit A. The opinion of the District Court for the Northern District of California is unreported. A copy of that opinion is attached to this petition as Exhibit B.[1/]

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 1983. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

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1. When this case began in the lower courts, Ruth Rushen was the Director of the California Department of Corrections. She has since been replaced by Daniel J. McCarthy, in whose name this petition is being filed.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. State Proceedings

Respondent Daniel L. Bruno was convicted in San Francisco Superior Court of first degree murder (Cal. Pen. Code § 187), kidnapping (Cal. Pen. Code § 207) and possession of a concealable firearm by an ex-felon (Cal. Pen. Code § 12021). He was sentenced to state prison on October 20, 1978 for a life term as prescribed by law for the murder. Additional terms for the other offenses

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were stayed (CR 1; ER, Tab 1 at Exhibit A).[2/]

Respondent's conviction was affirmed by the California Court of Appeal, First Appellate District, on March 30, 1981 (ER, Tab 1 at Exhibit B). A copy of the opinion is attached to this petition as Appendix C. The California Supreme Court denied his petition for hearing on May 27, 1981 (ER, Tab C).

B. Federal Proceedings

A petition for writ of habeas corpus was filed in the United States District Court for the Northern District of California on March 5, 1982 (CR 1; ER, Tab 1). An order granting the petition and requiring the State of California to retry

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2. CR designates the District Court clerk's record followed by the docket number and page number; ER designates the Excerpt of Record filed in the Ninth Circuit, followed by the tab number and page number.

respondent or release him within 90 days was filed on February 11, 1983 (CR 19; ER, Tab 19).

Petitioners filed a notice of appeal on February 24, 1983 (CR 21; ER, Tab 21).

In a per curium opinion filed on December 12, 1983, the Court of Appeals for the Ninth Circuit affirmed the order of the district court.

STATEMENT OF FACTS

About 2:00 p.m. on the afternoon of February 6, 1978, Arnold Lualhati was shot twice in the head at close range while he was lying in the trunk of his car (RT 54-56, 104-105, 678).[3/] He had

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3. RT designates the trial transcript and RST a supplemental transcript containing the arguments of counsel, both of which were lodged with the district court. Portions of these transcripts are included in the Excerptof Record at Tabs D and E, and will be designated by citations to the ER tab and RT or RST page number.

a handcuff on one hand, a stocking around his neck which had apparently been used as a gag and his legs were bound with tape (RT 53a-54, 105-107).

Though one person witnessed the murder, he could not identify the man who shot Lualhati, nor the woman with him (RT 76-79, 82-85). He did, however, write down the license number of the car in which the couple fled the scene, as did another witness who heard gunshots and saw the car drive off (RT 88-89, 91-94). That car, identified as belonging to respondent, was found abandoned in an industrial area of San Francisco about an hour after the shooting (RT 81, 94-95, 98-101, 155-158). Respondent had left his residence in the car on the afternoon of the shooting and never returned (RT 156-157, 159). A .45 caliber pistol, later determined to be the murder weapon, was found in the car (RT 135, 335, 337, 339, 343-344).

William Gray picked up respondent and his girlfriend, Guadalupe Velasquez, a couple of blocks from where respondent's car was located, about 4:00 p.m. on February 6 (RT 197199). During a ride to San Jose, respondent bragged about having shot Lualhati because the victim had stolen $100,000 from respondent on New Year's Eve. Respondent had saved the money from selling narcotics (RT 200-204). Though he was afraid to get involved, Gray, ultimately told the police what he had learned from respondent (RT 206, 251252, 293, 296-300, 338-359).

Respondent and Ms. Velasquez were arrested in an Oakland motel on April 3, 1978. In their room was a suitcase containing $12,000 in cash (RT 194-196). Outside the open bathroom window was a .9 milimeter, semi-automatic pistol (RT 344-345).

Respondent denied killing Lualhati, claimed that his car was stolen on the morning of February 6 and said he received an anonymous telephone call threatening his life (RT 485, 596, 602-602). He and Ms. Velasquez fled their residence and moved around the state, shooting heroin, until their arrest (RT 487-488, 492-493, 602-603).

Respondent and Ms. Velasquez both testified that they had been attacked and tortured on New Year's Eve by a group of men looking for his drug money. Respondent determined that Lualhati had been involved (RT 441-456, 469-472, 476-478, 578-579, 589-594). He and Ms. Velasquez nevertheless denied shooting Lualhati. They also denied knowing Gray or confessing to him (RT 491-492, 603, 615). In addition, respondent presented testimony from two witnesses that Gray had a poor reputation for honesty and truthfulness

(RT 402, 417418).[4]

REASONS FOR GRANTING THE WRIT

Respondent was convicted on September 22, 1978 in a California superior court of an execution-style, drug-related murder. The trial of that case was hard-fought and at times acrimonious; more than once the trial judge counseled the attorneys about their actions. The judge admonished the jury that statements of the attorneys were not evidence, and later instructed on that point. He concluded that while some comments by the prosecutor should not have been made, they did not require the granting of a mistrial. The California Court of Appeal carefully reviewed the entire record of

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4. Rebuttal testimony from Ms. Velasquez' mother directly relates to legal issues and is summarized in the argument.

respondent's trial and held that actions by the prosecutor which it characterized as misconduct were cured by the trial court's admonitions and were harmless beyond a reasonable doubt. That court affirmed respondent's convictions for first degree murder and other offenses. The California Supreme Court denied hearing. In short, eleven state jurists rejected the claim that any actions by the prosecutor deprived respondent of a fair trial.

In February 1983, exactly five years after the murder, the federal District Court for the Northern District of California reversed respondent's conviction because it concluded that prosecutorial misconduct had rendered the trial unfair. The federal court rejected the state appellate court's determination that certain instances of misconduct had been

cured by the state trial judge's admonition and instructions to the jury; it made no reference to the state trial court's ruling. The federal court gave no reasons for its decision, nor did it indicate that it had presumed the correctness of any factual determinations made in the state courts. A three-judge panel of the Ninth Circuit Court of Appeals affirmed the District Court's order based solely on its conclusion that certain comments by the prosecutor, several of which had not been objected to in the state courts, were improper and prejudicial. It offered no analysis for its decision, made no reference to the state trial record and failed to discuss contrary conclusions by the state courts. Four federal judges have thus reversed respondent's murder conviction.

We submit that the federal courts failed to give proper deference to state court factual findings. Where state courts have determined that instances of prosecutorial misconduct were cured by admonitions and instructions to the jury, and were thus not prejudicial, those decisions are entitled to a presumption of correctness. Federal courts must also review the trial record as a whole to determine whether errors were prejudicial. The Court of Appeals made no effort to undertake such a review. The case is appropriate for review by this Court because it presents an important question of the limits to be imposed on federal habeas courts when reviewing allegations of prosecutorial misconduct in state criminal trials. Last term this Court considered the related issue of limiting federal supervisory authority to control

misconduct by federal prosecutors. United States v. Hastings (1983) ___ U.S. ___, 103 S.Ct. 1974. More importantly, this case demonstrates yet again the persistent refusal by the courts of the Ninth Circuit to respect the integrity of state court findings and the principles of comity identified by Congress in 28 U.S.C. § 2254 and by several recent decisions of this Court, most of which have involved the Ninth Circuit. Summary reversal requiring the lower courts to comply with those rules may be appropriate.

ARGUMENT

At respondent's murder trial in state court the following testimony was elicited. Mrs. Lupe Roldan, Guadalupe Valasquez' mother, gave a statement to the police and prosecutor which incriminated respondent and impeached part of Ms. Valasquez' testimony (RT 688-693).

She denied making some of those statements and recanted other parts of her statement on the stand (RT 656-657, 659-660, 670, 672). It was established that immediately after the police left her home, Ms. Velasquez called her lawyer and then met with him, her mother and respondent's lawyer (RT 661, 663, 669).

In his opening argument the prosecutor suggested without objection from defense counsel, that it could be inferred Mrs. Roldan changed her statement to the police after talking with her daughter and the lawyers for respondent and Ms. Velasquez (See ER, Tab E at RST 318-321). He reminded the jurors that it was their responsibility "to find the facts" and to decide "what is truthful about those statements and what is not" (ER, Tab E at RST 321). During his argument, defense counsel accused the police of making Ms. Roldan "into a puppet," of "terroriz[ing]" her and of misleading her (ER, Tab E at

RST 340-341). According to respondent's counsel, the meeting with the defense lawyers was "not to conjure up perjury for the next day, but to truthfully tell" them what had happened (ER, Tab E at RST 341).

In closing the prosecutor argued as follows:

> Talk about puppets, talk about malleable, talk about presure!
>
> That lady was brought down to a lawyer's office across the street from this building that very night, and spoke with the lawyer who represented her daughter. She spoke with Mr. Serra who represents Mr. Bruno in this case. And what happens? The next day she has a lawyer of her own, recommended by Mr. Serra. Does that

all tell you what happened to that poor lady?

What kind of pressures did they exert upon her? What did they tell her was going to happen to her daughter - and there is no question about the fact that she was concerned. Concerned about her daughter and her connection with the murder case. No doubt they told her that her daughter had testified opposite to what she had said in her statement.

MR. SERRA [Defense Counsel]: I will object to that. There's no evidence of that.

MR. ROWLAND [Prosecutor]: I think a reasonable inference can be drawn --

MR. SERRA: I object.

THE COURT: Overruled, this is argument. (ER, Tab E at RST 368).

The prosecutor later argued as follows:

There is a Judas syndrome at work here and the criminal justice system is the cathedral. And it's been a terrible sight to see it sullied the way it has been during this trial with the most blatant lies. But to complete that Judas syndrome the - the defense is the Judas in this case, may have betrayed that system and there are 30 pieces of silver, or that $12,000 given over by the

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defendant to his counsel.[5/]

MR. SERRA: I will object to that. I didn't even get it. That's not even true.

THE COURT: Well, just a moment. I am going to sustain the objection, ladies and gentlemen.

MR. SERRA: And you know that's not true.

THE COURT: Just a moment.

MR. SERRA: I didn't even get that.

THE COURT: Mr. Serra, you are testifying now.

Ladies and gentlemen, disregard the remarks of both counsel. It is not in evidence,

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5. Defense counsel had argued about the "Judas Syndrome" in reference to Arnie Lualhati, the murder victim (ER, Tab E at RST 351). Respondent testified that he gave the $12,000 found on him at his arrest to his attorney (RT 640).

> it is not before you, it is not a matter for you to consider here. This is argument. Counsel are given some latitude in their argument but they are not permitted to testify, either counsel. In my judgment there's been too much testimony by the lawyers in this case.
>
> Keep in mind your responsibility is to decide the case on the facts and the evidence presented from the witnesses and the law that applies to the case. (ER, Tab E at RST 376-377). (Emphasis added.)

After argument, but before the jury was instructed, defense counsel moved for a mistrial based upon the above argument (RT 753-754). In denying that motion the state trial judge concluded that while the "comments on fees, et

cetera" were perhaps "not necessary," "in [his] judgment" there was "no prejudice or any basis for a mistrial under the circumstances. . . ." (RT 754.) He then instructed the jurors that the statements of the attorneys were not evidence and could not be considered as such (RT 763).[6/]

The California Court of Appeal concluded that the prosecutor's argument with respect to Ms. Roldan's testimony and his reference to the "Judas Syndrome" were misconduct. It also concluded, however, that the judge's prompt admonition and later instruction that statements of counsel are not evidence cured the misconduct. The court then reviewed in considerable detail all of the allegations of misconduct raised on appeal and held from "a

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6. The prosecutor offered a similar disclaimer at the beginning of his argument (ER, Tab E at RST 282).

review of all the evidence in this case" that the errors were harmless beyond a reasonable doubt (See Appendix C).

The federal District Court also held that the prosecutor was guilty of misconduct, but disagreed with the state Court of Appeal's conclusion that the admonition and instruction cured any harm. Although the court did detail the facts, without analysis nor any effort to explain the reason for its disagreement with the state courts, the District Court found the misconduct compounded other errors[7/] and was not harmless beyond a reasonable doubt. There was no reference to the state

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7. The District Court also found error during the cross-examination of respondent and in argument under Doyle v. Ohio (1976) 426 U.S. 610. That issue is not before the Court because the Ninth Circuit failed to reach it. We do not concede, however, that there was Doyle error in this case.

trial judge's conclusion that a mistrial was not required.

In a terse, per curium opinion, the Ninth Circuit Court of Appeals affirmed the District Court, relying strictly upon the prosecutor's closing argument; it did not reach the Doyle issue. Without reference to the trial record, the trial court's admonitions and instructions or the California Court of Appeal decision, the Ninth Circuit concluded that the prosecutor "undoubtedly was guided by less than that most exalted of all principles" and his statements "were not accidental but calculated to wrongfully impute guilt to the defendant." 721 F.2d at 1195. The federal appeals court drew from the argument inferences not made by the California courts nor even by the District Court.

The authority of a federal district court to grant a petition for writ of habeas corpus is limited by 28 U.S.C.

§ 2254(d), which provides that factual findings by state courts "shall be presumed to be correct" except under certain condtions. This section, which applies to state appellate courts as well as to trial courts [Sumner v. Mata (1981) 449 U.S. 539, 547], "requires the federal courts to show a high measure of deference to the factfindings made by the state courts." Sumner v. Mata (1982) 455 U.S. 591, 598. It is not enough for the federal court to "simply disagree with the state court." "Instead, it must conclude that the state courts' findings lacked even 'fair[] support' in the record." Marshall v. Lonberger (1983) ___ U.S. ___ 103 S.Ct. 843, 850. Though this Court has, in recent terms, attempted to impress upon the lower federal courts their obligations under section 2254(d), the Ninth Circuit seems oblivious to

this limitation upon its power to reverse state criminal convictions. See Sumner v. Mata, supra, 449 U.S. at 539; Sumner v. Mata, supra, 456 U.S. at 591; Rushen v. Spain (1983) ___ U.S. ___, 104 S.Ct. 453. This case presents yet another departure from the principles of comity upon which section 2254 is premised.[8/]

"[F]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of a constitutional dimension." Smith v. Phillips (1982) 455 U.S. 209, 221. Thus, a federal court may reverse a state court conviction based upon claims of prosecutorial misconduct only when it concludes

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8. Though we did not specifically refer to section 2254(d) in the lower federal courts, we have consistently argued the importance of the state court findings in a habeas corpus proceeding. In any event, the mandates of section 2254(d) are jurisdictional and may be raised at any time. Sumner v. Mata, supra, 449 U.S. at 547-548, n. 2.

that the prosecutor's actions rendered the trial "so fundamentally unfair as to deny [the defendant] due process." Donnelly v. DeChristoforo (1974) 416 U.S. 637, 645. "[T]he touchstone of due process analyses in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, supra, at 219.

Even where federal appeals courts have supervisory authority over federal prosecutors, "those powers are not to be exercised in a vacuum." United States v. Hastings (1983) ___ U.S. ___, 103 S.Ct. 1974, 1979. The reviewing court must consider the trial record "as a whole" and ignore errors that are harmless, "including most constitutional violations." Id. at 1980. The doctrine of harmless error cannot be "lightly and casually ignored in order to chastise

what the court viewed as prosecutorial overreaching." Id. at 1979.

Questions relating to the behavior of prosecutors in state criminal trials are particularly suited to determination by the state courts. The California courts, for example, have shown their willingness to protect the integrity of the trial system by reversing convictions when defendants were prejudiced by prosecutorial improprieties. See, e.g., People v. Bain (1971) 5 Cal.3d 839, 97 Cal.Rptr. 684, 489 P.2d 564; People v. Criscione (1981) 125 Cal.App.3d 275, 177 Cal.Rptr. 899; People v. Rodgers (1979) 90 Cal.App.3d 368, 153 Cal.Rptr. 382.

We recognize that determination of prejudice based upon a showing of misconduct is, in part, a mixed question of law and fact arguably not governed by section 2254(d). Sumner v. Mata, supra, 455 U.S. at 597. The factual issues preceding that

determination are, of course, controlled by the statute. These include whether the statements were made, whether they can be characterized as misconduct, whether admonitions or instructions to ignore them were given and whether such admonitions were effective to cure the misconduct. Moreover, the final determination of prejudice requires a careful balancing of the misconduct and any admonitions relating to it against the facts of the case. Where, as here, the state appellate court undertook that weighing process after specifically finding that admonitions cured any misconduct, a federal court should not be allowed to simply reject out of hand the state court's finding of harmless error. We submit that the impact of prosecutorial misconduct is so inextricably bound up with the facts of the case and with the state court fact

finding process that federal courts should be required to give deference to a state court's finding that admonitions cured any harm, to state precisely its reasons for finding prejudice in light of the trial record as a whole and to justify its drawing of more sinister inferences from the prosecutor's argument than were made by the state court. Cf. United States v. Hastings, supra, 103 S.Ct. at 1980; Donnelly v. DeChristoforo, supra, 416 U.S. at 646-647. We submit that findings by state courts that prosecutorial misconduct was not prejudicial in light of admonitions and instructions to the jury, and based upon a review of the facts of a particular case are entitled to the presumption of correctness in section 2254(d).

In this case the Ninth Circuit affirmed the District Court order reversing respondent's state murder conviction

without reference to the state trial record or to the state Court of Appeal decision.[9/] Similarly, the District Court rejected out of hand the state Court of Appeal's conclusion that admonitions by the trial judge obviated any harm from the prosecutor's statements. Clearly, neither federal court gave any deference to the specific state court findings. Both failed to strike a balance between disciplining the prosecutor and the state's interest in the

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9. Particularly distressing is the Ninth Circuit's criticism of comments in the prosecutor's opening argument, none of which were objected to and which under California procedural rules could not be raised on appeal. People v. Green (1980) 27 Cal.3d 1, 34, 164 Cal.Rptr. 1, 609 P.2d 468. Even defense counsel characterized the prosecutor's opening statement as "persuasive," commenting that the prosecutor was "an honorable man, he's a very skillful lawyer, he's a competent lawyer, he's an able speaker, he is sincere, he's knowledgable, he's professional, he's good, he is honest" (ER, Tab E at RST 325).

prompt administration of justice. Cf. United States v. Hasting, supra, 103 S.Ct. at 1981. Their actions provide yet another example of the Ninth Circuit's persistent refusal to acknowledge the primary responsibility of state courts to control state criminal proceedings and the deference to which factual decisions of state courts are entitled.

CONCLUSION

For the above reasons, we respectfully submit that a petition for writ of certiorari be granted in this case, or in the alternative that the Ninth Circuit decision be summarily reversed.

DATED: March 9, 1984

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Deputy Attorney General

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL L. BRUNO,	)	No. 83-1724
Petitioner-Appellee	)	D.C. No.82-0910
v.	)	
RUTH L. RUSHEN, Director, California Department of Corrections, and PAUL J. MORRIS, Warden, California State Prison at Folsom,	)	OPINION
Respondents-Appellants.	)	

Appeal from the United States District Court for the Northern District of California
Spencer Williams,
District Judge, Presiding
Argued and submitte, September 16, 1983

Before: CHOY and NORRIS, Circuit Judges, and NIELSEN, *
District Judge

PER CURIAM:

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* The Honorable Leland C. Nielsen, U. S. District Judge for the Southern District of California, sitting by designation.

I

Daniel L. Bruno was convicted in 1978 of first degree murder and his conviction was affirmed by the California courts. He thereafter petitioned the United States District Court for the Northern District of California for a writ of habeas corpus. He proceeded on two grounds. He charged first that his prosecutor had violated Doyle v. Ohio, 426 U.S. 610 (1976) by unfairly disclosing and using the defendant's post-arrest silence to suggest to the jury that the entire defense first related at trial must therefore have been fabricated. He relied on several allegations of prejudicial and impermissible comments by the prosecutor as the second basis for his petition. This court agrees with the district court that the prosecutor's comments were improper and not harmless

beyond a reasonable doubt. Therefore, since there is an independent and sufficient basis to affirm the district court's grant of the writ, we do not reach the claim that Doyle error occurred.

II

In opening arguments before the jury,[1] the prosecutor reviewed the testimony of an important witness for the defense that had repudiated earlier pro-prosecution statements she had given government investigators. He inferred that this sudden reversal at trial in her memory was the direct product of her consultation with the accused's attorney before she took the stand. He returned to this theme in the closing part of his argument.[2] Thus, in hopes of destroying the credibility of her testimony on the stand, the prosecutor had

labelled defense counsel's actions as unethical and perhaps even illegal without producing one shred of evidence to support his accusations.

In closing his summation [3] the prosecutor lunged into a vicious attack on the accused's claims of innocence by openly hinting to the jury that the fact that the accused hired counsel was in some way probative of the defendant's guilt. Indeed, the obvious import of the prosecutor's comments was that <u>all</u> defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client's involvement with the alleged crimes. As in the earlier accusation of witness tampering, the prosecutor offered nothing from the evidence adduced at trial to support his suspicions that defense counsel had agreed for

the sake of profit to aid in fabricating a defense. On appeal, the State of California nevertheless attempts to explain away these insinuations and accusations as just "another reasonable interpretation" of the meeting of defense counsel with the witness, and contends that there was no error since the "undisputed testimony of defense counsel's involvement in that meeting and the complete reversal of the witness's memory following it" was "evidence" in the record to support the prosecutor's comments. They also claim that the trial judge's generalized admonition to the jury to only consider what was in evidence adequately cured any prejudice from comments on Bruno's exercise of his right to counsel. In the alternative, they submit that any error was harmless beyond a reasonable doubt. We disagree on the evaluation of error,

and find the error not harmless beyond a reasonable doubt.

III

At the outset, we feel it incumbent on us to note that in no situation in a criminal trial such as this one do we feel the mere act of hiring an attorney is probative in the least of the guilt or innocence of defendants. "[L]awyers in criminal cases are necessities not luxuries," Gideon v. Wainwright, 372 U.S. 335, 344, (1963), and even the most innocent individuals do well to retain counsel. See also, Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Sulie v. Duckworth, 689 F2d 128, 131 (7th Cir.1982). Neither is it accurate to state that defense counsel, in general, act in underhanded and unethical ways, and absent specific evidence in the record, no particular defense counsel can

be maligned. Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice. Id. Furthermore, such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and we readily presume because the principle is so fundamental that all attorneys are cognizant of it. Any abridgment of its sanctity therefore seems particularly unacceptable.

Even more egregious, however,

are attempts by representatives of the government to resort to these reprehensible means to shortcut their responsibility to ferret out all admisible evidence and use only that to meet their burden of proof. We fear resort to such conduct indicates either an absence of sufficient evidence to convict or reflects shoddy government efforts that have failed to unearth admissible evidence. If the former is true, the government attorney has fulfilled his obligation to the People. He has served the twofold aim of justice "that guilt shall not escape or innocence suffer". Berger v. United States, 295 U.S. 78, 88 (1934). That is his highest purpose. He has no obligation to win at all costs and serves no higher purpose by so attempting. Indeed, "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction

as it is to use every legitimate means to bring about a just one". Id.

In this case the prosecutor undoubtedly was guided by less than that most exalted of all principles. His insidious attacks on Bruno's exercise of his constitutional right to counsel and his attacks on the integrity of defense counsel were error. United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980).

IV

Because an error of constitutional dimensions occurred, we need only determine now whether it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). See also, United States v. Valle-Valdez, 554 F.2d 911, 915 nn 5-8, (9th Cir. 1977).

The improper remarks were made at an important stage of the trial and were extensive. They were not accidental

but calculated to wrongly impute guilt to the defendant. These comments "strike at the jugular" of the defendant's story, United States v. McDonald, 620 F.2d at 563, and they were not withdrawn upon objection. The cumulative effect of the prejudice can reasonably be regarded as possibly affecting the verdict and thereby denying the defendant a fundamentally fair trial. Accordingly, we find the error not harmless beyond a reasonable doubt, and affirm the grant of the writ of habeas corpus.

AFFIRMED.

Footnotes

1. MR. ROWLAND (Prosecutor): Now, after that statement was given a lot of events started taking place . . . . All of the sudden lawyers start getting involved in the case. [¶] And the next thing you know the following day when the (witness) comes in to testify, all of a sudden everything got turned around and thats no longer the case.

2. MR. ROWLAND: . . . Have you ever seen anything to compare with the machinations? Talk about puppets, talk about malleable, talk about pressure! [¶] That lady was brought down to a lawyer's office across the street from this building that very night, and spoke with the lawyer who represents her daughter (who was living with the defendant at the time of the murder). She spoke with Mr. Serra who represents Mr. Bruno in this case. And what happens? The next day she has a lawyer of her own, recommended by Mr. Serra. Does that all

tell you what happened to that poor lady? What kind of pressures did they exert on her?

. . . .

MR. SERRA: I will object to that. There's no evidence of that.

MR. ROWLAND: I think a reasonable inference can be drawn. --

MR. SERRA: I object.

The COURT: Overruled, this is argument.

3. MR. ROWLAND: . . . There is a Judas syndrome at work here and the criminal justice system is the cathedral. And it's been a terrible sight to see it sullied the way it has been during this trial with the most blatant lies. But to complete that Judas syndrome the -- the defense is the Judas in this case, and they have betrayed that system and there are thirty pieces of silver, or the $12,000 given over by the defendant to his counsel.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL L. BRUNO,	)	
	)	
Petitioner,	)	No. C820910 SW
	)	
RUTH L. RUSHEN, Director, California Department of Corrections, et al.,	)	
	)	
Respondents.	)	
	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment shall be entered in the above-captioned matter for petitioner.

DATED: February 11, 1983

UNITED STATES DISTRICT JUDGE

ENTERED IN CIVIL DOCKET 14 Feb. 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL L. BRUNO, Petitioner, v. RUTH L. RUSHEN, Director, California Department of Corrections, and PAUL J. MORRIS, Warden, California State Prison at Folsom, Respondents.	No. C-82-0910 SW

ORDER GRANTING WRIT OF HABEAS CORPUS

I. Background

Petitioner Daniel L. Bruno was convicted by the California Superior Court of the kidnapping and first degree murder of Arnold Lualhati in February, 1978. The facts of the case are set out in detail in the opinion of the California Court of Appeals, which affirmed petitioner's conviction. We

summarize only the pertinent features.

Lualhati was found dead in the trunk of his green Cougar, with two gunshot wounds in the forehead inflicted from close range. The prosecution's case was based on the theory that petitioner had killed Lualhati in revenge after learning of Lualhati's participation in a drug-related robbery and beating of petitioner several months earlier.

A good deal of evidence linked petitioner to the killing. Two witnesses observed petitioner's red LTD at the scene of the shooting and wrote down its license number as it sped away. They could not identify petitioner as the killer, nor could they identify the woman seen sitting in the front seat as petitioner's wife. The red LTD was discovered the next day a short distance away, and the apparent murder weapon, a Colt .45 automatic, was found on the floor

behind the driver's seat. Petitioner's neighbor identified the LTD as petitioner's, and testified that she had seen him drive it away from his house around the time of the murder, and never return.

A few hours after the murder, a man named William Gray, who claimed to be friends with petitioner and his wife, saw them walking a few blocks from where the LTD was eventually found, and gave them a ride. Gray testified that Bruno said he had shot Lualhati earlier that day because of Lualhati's participation in the "rip-off" of Bruno.

The officer who first arrived at the murder scene discovered Lualhati's body with handcuffs on the right wrist, heavy tape around his lower legs, and a stocking around his neck. In the trunk, the officer found another set of handcuffs, a partial roll or wrapping tape

matching the tape around Lualhati's legs, and a slug. In the car he found various other items including a rifle and a box of 9 millimeter Lugar shells.

Bruno's home was searched two days after the murder and a pink slip was found indicating Bruno as the owner of the LTD. The house had red wall-to-wall carpet which was found to be indistinguishable from red fibers found on the tape wrapped around Lualhati's legs. Several other items were found, including a rifle case with a stocking tied to the end of it which appeared similar to the stocking tied around Lualhati's neck.

When Bruno and his wife were arrested almost two months later at a motel in Oakland, they were in possession of a suitcase filled with $12,000 in cash, two rounds of ammunition wrapped in foil, and a loaded 9 millimeter automatic

pistol, which was capable of firing the Lugar shells found in the Cougar.

Petitioner presented a substantial defense which countered most of the government's case. The main defense case was based upon the testimony of petitioner and his wife, both of whom denied any involvement in Lualhati's death.

Bruno and his wife were regular heroin users and small time dealers. Bruno testified that several years earlier he had saved $100,000 from selling heroin, which he had hidden in the house. He never told anyone about the money, including his wife, but he suspected that several people knew about it. One of these people was Arnold Lualhati, who petitioner sold heroin to and considered a close friend.

Both Bruno and his wife testified

that they were ripped off on the previous New Years Eve by six men who tortured them in an attempt to make Bruno divulge the hiding place of his $100,000. Bruno would not tell, but the men eventually found it and fled the house.

After the attack, the red LTD and a set of keys to it and the house were missing. The car was eventually recovered a few blocks away. Bruno testified that he then collected all the evidence left behind by the attackers, such as rolls of tape, handcuffs, the sock used as a gag, and large syringes of heroin, which he put in the trunk of the LTD, because he intended to hire a private investigator.

Petitioner suspected Lualhati had been involved in the robbery, a suspicion which was confirmed when petitioner eventually forced Lualhati to admit his participation. Lualhati agreed to help

Bruno recover some of the money and locate the other participants. He eventually gave $15,000 back to Bruno.

Petitioner testified that on the morning of Lualhati's death, he and his wife noticed that the LTD was missing. They phoned a few people, including Lualhati, but he was not home. Mrs. Lualhati testified that Bruno called and left the message "tell Arnie I called." Bruno then got a call around noon from an unidentified caller telling him that "they" had found a "snitch," Arnie Laulhati, and that Arnie was a "dead man" and "they" were going to put him in Bruno's car and come after Bruno next.

Bruno and his wife were driven later that day by a friend to a motel, with a suitcase full of cash, a few personal belongings, and some heroin. They found out about Lualhati's death in the newpapers the next day, but

testified that they did not turn themselves in because they were named as suspects and they did not believe the police would believe they were innocent. They moved to various motels in Oakland and went to Los Angeles for a while, until their arrest back in Oakland.

Bruno denied knowing William Gray, and the defense introduced witnesses to attack Gray's credibility. Although a good deal of other evidence was introduced, it cannot be said from a reading of the entire record that the government's evidence was "overwhelming," nor that the defense was "transparently frivolous." The significance of these charcterizations of the evidence will be explained infra.

After his conviction, petitioner prosecuted an unsuccessful appeal to the California Court of Appeals, and later

failed in an attempt to obtain post-conviction relief. This federal habeas corpus petition followed.

II. Issues

Petitioner raises four issues in his petition for writ of habeas corpus. All involve various instances of prosecutorial misconduct:

1) Use of silence after arrest to imply fabrication of defense testimony.

2) Reference to facts outside the record.

3) Expression of personal belief in the reliability of prosecution witnesses and in the guilt of petitioner.

4) Attack on the integrity of defense counsel. Petitioner contends that this denied him a fundamentally fair trial.

Each of these issues are discussed in sequence below.

1) Use of silence after arrest to imply fabrication of defense testimony.

Admission of evidence that a defendant chose to exercise his right to remain silent after arrest has been held to violate due process. Doyle v. Ohio, 426 U.S. 610 (1976).

Recently, the Supreme Court refined Doyle by limiting it to situations when an attempt is made to impeach a defendant by his silence after having received Miranda warnings. Fletcher v. Weir, 71 L.Ed.2d 490, 494 (1982). The Court explained that the use of silence for impeachment after receipt of Miranda rights was fundamentally unfair because "Miranda warnings informed a person of his right to remain silent and assure him, at least implicitly, that his silence would not be used against him. . ." Anderson v. Charles, 447 U.S.

404, 407 (1980); compare Jenkins v. Anderson, 447 U.S. 231, 239-240 (1980).

In addition, the prosecutor is forbidden under the Fourteenth Amendment from commenting on an accused's failure to testify. Griffin v. California, 380 U.S. 609 (1964). since a defendant never has the burden of producing any evidence in his own behalf at any stage of the proceedings, allowing comment on this privelege makes its assertion costly.

The California Court of Appeals found the prosecutor's comments, both during cross-examination and closing argument, to be error in light of Doyle. First, although the record is unclear, petitioner has presented evidence to this court which establishes that he was given his Miranda rights following his arrest (as well as on several other occasions), and chose to invoke his

right to remain silent.

Furthermore, the prosecutor's questions to Bruno and his wife obviously sought to impeach petitioner through their silence after, rather than before, their arrest.[1/] For example, on cross-examination the prosecutor elicited from petitioner's wife that after their arrest at the motel, they had been in the custody of both the Oakland and San Francisco police. The next question he asked her was: "The account of the events

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1/ Ordinarily a defendant cannot complain where the prosecutorial abuse is of another's exercise of the constitutional privelege against self-incrimination. However, the context of the prosecutor's cross-examination of petitioner's wife and the use to which her answers were put during closing argument indicate that the prosecutor's primary purpose was the impeachment of petitioner's defense. The questions to petitioner's wife compounded the improper questioning of petitioner and the closing argument, and thus rises to the level of a violation of petitioner's right to a fundamentally fair trial. See U.S. v. Rubin, 559 F.2d 975 (5th Cir. 1977).

as you have told them. . .today. . .did you tell that particular account to anyone else in law enforcement prior to today?" After objections to that question were overruled, the prosecutor asked: "You didn't tell what you told to the ladies and gentlemen of the jury today to any of the policemen who arrested you in Oakland did you?"

Similarly, shortly after asking petitioner about his arrest, the prosecutor proceeded to question him as follows: "At the preliminary hearing with reference to the testimony that you gave today, is this the first time that you ever gave even that story in the form of testimony that you gave today, is this the first time that you ever gave even that story in the form of testimony?" He then asked petitioner, over objection, "Who was the first

person to whom you told that account?" Petitioner responded, "My attorney."

During closing argument, the prosecutor utilized the prior line of qustioning to imply that the defense was fabricated. His exact words were, "As they testified, the account they are giving of the events in this case never came out until here in this courtroom when they testified before you. [¶] Opportunity for fabrication was immense - immense." Throughout his argument to the jury, the prosecutor repeated his charge, over strenuous objection by defense counsel and admonishment from the judge, that the failure of petitioner and his wife to testify at the preliminary hearing demonstrated that they had the opportunity to, and did, fabricate their defense.

It is clear, then, that the prosecutor committed error in commenting on

petitioner and his wife's constitutional right to remain silent after their arrest and to refrain from testifying at the preliminary hearing, in order to impeach petitioner's defense. In cases such as this involving constitutional errors, reversal is required unless the court determines that the error was harmless beyond a reasonable doubt. U.S. v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978); Chapman v. California, 386 U.S. 18, 24 (1967).

In Williams v. Zahradnick, 632 F.2d 353, 363 (4th Cir. 1980), the court said, "[b]ecause the nature of a Doyle error is so egregious and so inherently prejudicial, reversal is the norm, rather that the exception." In the Ninth Circuit, it has been held that the error is not harmless when the "comment is extensive, where an inference of guilt from silence is stressed to the

jury as a basis of conviction, and where there is evidence that could have supported the acquittal." Scarborough v. Arizona, 531 F.2d 959, 962 (9th Cir. 1976); quoting Anderson v. Nelson, 390 U.S. 523, 524 (1968).[2/] The prosecutorial comment must be judged in light of

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2/ Cases in other circuits which have reversed for Doyle error are: U.S. v. Impson, 531 F.2d 274 (5th Cir. 1976), cert. den. 434 U.S. 1050 (1978) (Even a single reference on direct examination to defendant's silence carried an intolerable prejudicial impact, where the defendant's exculpatory story was not totally implausible and the government's inculpatory evidence was not overwhelming); U.S. v. Harp, 536 F.2d 601, 603 (5th Cir. 1976) (The prosecutor's comments "struck at the jugular" of the defendant's story, refuting his exculpatory defense, and such comments are "rarely declared harmless"); U.S. v. Luna, 539 F.2d 417 (5th Cir. 1976) (Defendant's conviction reversed for single comment constituting Doyle error during closing argument); U.S. v. Johnson, 558 F.2d 1225, 1230 (5th Cir. 1977) (Improper testimony went to heart of sole defense, "encouraging the jury to believe that the defense was fabricated after arrest"); U.S. v. Edwards, 576 F.2d 1152, 1155 (5th Cir.

(Footnote continued on next page)

the evidence as a whole. U.S. v. Lopez, supra, at 685.

(Footnote 2 continued)

1978); U.S. v. Meneses-Davila, 580 F.2d 888, 895 (5th Cir. 1978) (The prosecutor "implied that defendant's explanation was a recent fabrication, and used defendant's failure to speak before trial to support that suggestion. Reversible error occurred whether or not defendant's testimony about his lack of knowledge that marijuana was in the car was unbelievable"); Morgan v. Hall, 569 F.2d 1161, 1167 (1st Cir. 1978) (Holds that a prompt and forceable instruction by the judge did not cure the error, because defendant's silence was used to impeach his exculpatory story); U.S. ex rel Allen v. Rowe, 591 F.2d 391, 400 (7th Cir. 1979) ("In each of the cases in which a Doyle violation was held to constitute harmless error, the prosecutor asked only one question eliciting the fact of the defendant's silence. Neither in cross-examination nor in closing argument did the prosecutor suggest that silence impeached the defendant's trial testimony"); Williams v. Zhradnick, 632 F.2d 353, 362 (4th Cir. 1980) ("The post-arrest silence of Williams (1) was used by the prosecution to impeach his alibi, (2) was an issue introduced and pursued by the prosecution, (3) was brought out in a case where the other evidence of guilt was not overwhelming, (4) was a matter

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Our review of the record in this case convinces us that the prosecutor's improper comments were not harmless beyond a reasonable doubt. First, the comments were extensive. The prosecutor brought up the subject during cross-examination of Bruno and his Wife, and then again, repeatedly, during closing argument.

Furthermore, an inference of petitioner's guilt from his silence was clearly stressed to the jury as a basis for conviction. The prosecutor meant to imply that "the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere

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(Footnote 2 continued)

repeatedly referred to by the prosecution, and (5) was a matter [on] which the trial judge gave no curative instruction. All the indicators, therefore, point to a "harmful" rather than a "harmless" classification for the error").

along the way, perhaps to fit within the seams of the state's case as it was developed at pretrial hearings." Doyle v. Ohio, supra, at 616.

Finally, there was evidence presented by the defense which could have supported acquittal. In fact, the case was a close one. Petitioner was not identified by either of the witnesses to the shooting. The defense impeached the credibility of the chief government witness linking petitioner to the crime, William Gray, as well as having an explanation for most of the government's circumstantial evidence.

We conclude, therefore, that the error was not harmless. The judgment of the Court of Appeals must be reversed.

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2) Reference to facts outside the record.

During closing argument, the prosecutor referred to facts outside the record, in an attempt to explain to the jury that a reference to the possibility of there being two men involved in Lualhati's death, rather that one, made by defense counsel during his closing statement, was based on mistaken information. Counsel for petitioner objected, and the prosecutor responded: "I think the jury has the right to know the truth." The prosecutor was then admonished by the court to confine his argument to the evidence admitted in the case.

The government has conceded, and the state Court of Appeals found, that the prosecutor's remarks were improper. In argument to the jury a prosecutor may not make statements of fact which are not supported by the evidence introduced in

the case. U.S. v. Roberts, 618 F.2d 530, 533, 534 (9th Cir. 1980), cert. den. 101 S.Ct. 3088 (1981). Nevertheless, we conclude that the trial judge's prompt admonition to the prosecutor to confine his argument to the evidence in the case cured the defect.

3) Expression of personal belief in the reliability of prosecution witnesses and in the guilt of petitioner.

Petitioner contends that on various occasions the prosecutor impermissibly expressed his personal belief in the reliability of the witnesses for the prosecution. Petitioner further contends that at several other instances the prosecutor expressed his personal belief in petitioner's guilt. This type of conduct, if established, is misconduct, for a prosecutor may not express his personal opinion on the merits of

the case or the credibility of witnesses. U.S. v. Morris, 568 F.2d 396 (5th Cir. 1978).

As a threshhold matter, respondent contends that petitioner is barred from raising this issue in this proceeding because of defense counsel's failure to object to these alleged instances of misconduct. Wainwright v. Sykes, 433 U.S. 72 (1977); People v. Green, 27 C.3d 1, 34 (1980). However, the California Court of Appeals did not rely exclusively on this procedural defect in ruling on petitioner's appeal, and therefore, we are not precluded from providing federal habeas review.3/ Thompson v. Estelle,

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3/ In its entirety, the discussion by the Court of Appeals:

> "Appellant contends the prosecutor committed misconduct in expressing personal belief that the prosecution witnesses were truthful, that

(Footnote continued on next page)

642 F.2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F.2d 1994, 1996 n.2 (9th Cir. 1979).

(Footnote 3 continued)

> defendant and [his wife] were fabricating, and that defendant was guilty. Misconduct on this ground is not demonstrated.
> The prosecutor properly argued to the jury that based upon the evidence adduced at trial he believed the defendant guilty of the charged crimes. This is a far cry from the situation condemned in People v. Bain (1971) 5 Cal.3d 839, 848, where there was substantial danger the jurors would interpret a statement as being based on information known to the prosecutor alone. Similarly, the prosecutor's suggestion that appellant and [his wife] were lying would be improper only if he conveyed the impression he had information on the subject in addition to the evidence adduced at trial. Further, no objection was offered by defense counsel; thus, under People v. Green (1980) 27 Cal.3d 1, 34, the alleged misconduct cannot be raised on appeal if a timely objection and admonition would have cured the alleged error. Here, had there been objection, the trial court could have made clear to the jurors the prosecutor had no information in addition to what they had heard and seen.

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We turn, then, to a determination of whether the prosecutor's comments were error. We must decide if the prosecutor was improperly expressing his personal opinion or belief in the merits of the case, or whether he was merely, engaging in permissible comment on the evidence introduced at trial. "[A]n attorney's statements that indicate his opinion or knowledge of the case as theretofore presented before the court and jury are permissible if the attorney makes it clear that the conclusions he is arguing are conclusions to be drawn from the evidence." U.S. v. Morris, supra, at 401.

(Footnote 3 continued)

> Similarly, the prosecutor's comments upon the truthfulness of the prosecution's witnesses were not objected to by defense counsel. It cannot be said that a timely objection and admonition would not have cured any error."

The foremost reason for restraining an attorney's expression of personal opinion is to prevent the jury from inferring that the opinion is based on evidence not before the court. The jury may be led to believe that because of the attorney's personal influence, his superior knowledge of the case, or his official position, he has private information supporting his beliefs. See U.S. v. Morris, supra, at 401-402. Therefore, a review of the cases appears to establish that an attorney's expression of personal opinion is error when the attorney implies it is based on evidence not before the jury. See U.S. v. Morris, supra; U.S. v. Martinez, 466 F.2d 679, 683 (5th Cir. 1972).

Judged by these standards, we agree with the state Court of Appeals that the comments of the prosecutor fall into the

category of proper comment on the evidence in the case. Although he did not always make it abundantly clear at every available opportunity, it is apparent that the prosecutor's expressions that government witnesses were telling "the truth" or that petitioner was "a liar" were based on his interpretation of the evidence and not on any personal belief based on information not made available to the jury.

4) Attack on the integrity of defense counsel.

During the trial, petitioner's mother-in-law repudiated statements she had made earlier to the prosecutor and two police officers that implicated petitioner. The prosecutor during closing argument attributed this repudiation to her consultation with the defense attorneys. He said:

> "Have you ever seen anything to compare with the with the machinations? Talk about puppets, talk about malleable, talk about pressure. That lady was brought down to a lawyer's office across the street from this building that very night, and spoke with the lawyer who represents her daughter. She spoke with Mr. Serra who represents Mr. Bruno in this case. And what happens? The next day she has a lawyer of her own, recommended by Mr. Serra. Does that all tell you what happened to that poor lady? [¶] What kind of pressures did they exert on her? . . .it was only later, in the hands of those three lawyers who talked to her that night, and she was here with her daughter the following day, they talked to her. You saw the lawyer who represented her talking to Mr. Serra in the courtroom. What do you suppose they were talking about? What do you suppose they were so concerned about?"

Later, the prosecutor implied that the fee that petitioner paid to his trial counsel prompted counsel to aid in fabricating the defense, by stating:

> "There is a Judas syndrome at work here and the criminal justice system is the cathedral. And it's been a terrible sight to see it sullied the way it has been

> during this trial with the most blatant lies. But to complete that Judas syndrome the -- the defense is the Judas in this case, and they have betrayed that system and there are 30 pieces of silver, or that $12,000 given over by the defendant to his counsel."

These comments are misconduct. No prosecutor may impuge the integrity of a defense counsel, without basis in fact, as a means of imputing quilt to a defendant. U.S. v. McDonald, 620 F.2d 557, 564 (5th Cir. 1980), cert. den. 101 S.Ct. 3034. The government has provided no facts to justify the allegations made by the prosecutor.

We disagree with the Court of Appeals that the subsequent admonition by the judge to the jury to keep in mind their responsibility to decide the case on the basis of the facts and not the testimony of the attorneys cured the error. The right to counsel is a basic right that must be zealously guarded. As

the court stated in McDonald, "[c]omments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of this defense cannot be considered harmless error. . .Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error." (id., at 564). We view the comments as compounding the other improper comments which implied that petitioner fabricated his defense. The government has not established that these comments are harmless beyond a reasonable doubt.

For the foregoing reasons, defendant was denied a fundamentally fair trial, and his conviction must therefore be reversed. We are compelled in ruling on this petition not to pass judgment on the probable guilt or innocence of petitioner; rather, our duty is to

uphold and apply well established principles of law. We express concern, however, over the outrageous disregard by the prosecutor not only of the rights of the accused in this case, but of all citizens who have come to expect that criminal proceedings will be conducted in an impartial and efficient manner. The words of Mr. Justice Sutherland in Berger v. U.S., 295 U.S. 78, 88 (1935) bear repeating:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite since the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at

> liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We hope that this case is but an isolated aberration from this general ideal. The writ of habeas corpus is hereby granted. The government has ninety (90) days in which to retry petitioner or he must be released.

IT IS SO ORDERED

Dated: 2/11/83

_____

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL L. BRUNO, Defendant and Appellant.	1 Crim. 18980 (Sup. Ct. No. No. 96886)

Daniel L. Bruno appeals from a judgment following a jury verdict finding him guilty of first degree murder, kidnapping and possession of a concealable firearm by an ex-felon. (Pen. Code §§187, 189, 207, 12021, subd. (a).)[1/] With respect to both the murder and kidnapping, the jury found appellant was armed with a firearm (§12022, subd. (a)) and had used a firearm (§12022.5); in connection with the kidnapping the

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1. All further statutory references are to the Penal Code unless otherwise indicated.

jury also found appellant had inflicted great bodily injury on his victim. (§12022.7.) We affirm the judgment.

FACTS

On February 6, 1978, Arnold Lualhati was found dead inside the trunk of his green Cougar with two gunshot wounds in the forehead. The prosecution's theory was that appellant had killed Lualhati in revenge for his participation in a drug-related robbery and beating of appellant on December 31, 1977. Appellant presented an alibi defense. Because of the nature of the contentions on appeal the facts are presented here in detail.

Prosecution's Case

At 2 p.m. on February 6, 1978, Arguimedes Macado heard a crash outside of his home on Sillman Street in San Francisco. He looked outside and saw directly in front of his house a green

Cougar automobile stopped a short distance in front of a red Ford LTD facing the same direction. A woman occupied the passenger seat of the LTD. Mercado saw a man exit from the driver's side of the LTD, walk over to the opened trunk of the green Cougar and fire three shots. The man then returned to the LTD and drove up the street and turned left onto Madison Street. Mecrcado wrote down the license number of the red LTD as 885 G67, then walked outside, looked in the trunk and saw a body later identified as Arnie Lualhati. Mercado could not identify either occupant of the LTD.

Guilbert Trujillo passed the two cars as he was driving on Sillman Street about 2 p.m. As he reached the corner of Madison Street he heard two shots. A red LTD drove past him, he wrote down the license number as 885 GMZ.

Officer Donald Ostrem of the San Francisco Police Department arrived at the scene at 2:40 p.m. He found a large crowd around the green Cougar parked in the middle of the street. In the trunk of the car he found Lualhati's dead body, with handcuffs on the right wrist, heavy tape around his lower legs and a stocking around his neck. In the trunk the officer found another set of handcuffs, a partial roll of wrapping tape matching the tape on the deceased, and a slug. In the back seat he found a Remington rifle with a scope, a blue jacket with a knife in one of the pockets, a brown belt with live 6.5 millimeter shells, and a holster with an ammunition clip. On the floor in the front of the car was a box of 46 9 millimeter Lugar shells. Under the car he found a .45-caliber casing. The police later learned that the Cougar belonged to

Lualhati.

The coroner's autopsy established Lualhati had been shot twice in the head at close range, death was caused by shock from the injury to the brain. In the coroner's opinion, the handcuffs had previously been around both wrists and the black stocking around his neck had been used as a gag.

On February 6, 1978, Bruce Harris was at work at The Trane Service Agency, located near the intersection of Sillman and San Bruno Avenues. About 3 p.m. he noticed a red LTD parked partially in front of the driveway; the car was still there when he returned the next morning about 7:15 a.m. Thinking the car was stolen, Harris looked in and saw a gun on the floor behind the driver's seat; the gun was later identified as a Colt .45 automatic. Both Mercado and Trujillo identified that car

as the one involved in the shooting the previous day. The license plate number was 885 GMZ.

In the opinion of crimalist Richard Grzybowski, the shell casing found under Lualhati's car had been fired from the gun found in the LTD, and the bullet fragments removed from the deceased could have been fired from the same weapon.

The red LTD was identified as appellant Daniel Bruno's car, by his neighbor Anni Adami. On February 6, 1978, about 2:00 or 2:30 p.m., she saw Bruno drive the LTD from his house and never saw him return. At about the same time Ms. Adami saw Guadulupe Velasquez, the woman who lived with Bruno, but she did not rememer whether she was also in the automobile.

At about 4 p.m. on February 6, 1978, William Gray was driving in the

vicinity of Silver and San Bruno Avenues (a few blocks from the Trane Service Company). When Gray saw his friends Bruno and Guadalupe Velasquez he stopped to ask if they would like a ride. As they got in he noticed Bruno had a gun in his waistband.

Gray testified that as he drove to San Jose, Bruno said he had shot Arnie Lualhati earlier that day because of his participation in a "ripoff" at Bruno's house. Bruno told Gray that when he and Velasquez returned home on New Year's Eve six men in ski masks tortured them for information leading to some $100,000 which the six eventually found. Bruno said it took him six weeks to find out who did it and that Lualhati was one of them. Bruno then invited Lualhati over to his house, bound, gagged, handcuffed him, and put him in the trunk. Bruno warned him if he

attempted to escape he would shoot him. Somehow Lualhati managed to get the trunk open in an attempt to escape Bruno shot him twice in the head. Bruno then got back in the car and "stashed it somewhere."

Gray dropped Bruno and Velasquez at a shopping center in San Jose and then went to see his friend, Karin King. Gray told her about the incident but indicated he did not intend to report to the police. Ms. King did report it to the police and eventually persuaded Gray to talk with police officers some hours later.

Inspector Prentice Sanders and Inspector Guilford of the San Francisco Police Department spoke with Gray at 1 a.m., February 7, 1978. Sanders testified Gray was "obviously frightened," did not want to become more involved in the case, and was afraid to

testify or identify the persons involved in the homocide.

Pursuant to a search warrant, Sanders and Grzybowski searched Bruno's home on Febrary 8, 1978. There the police found a pink slip indicating Bruno as the owner of the red LTD. The house had red wall-to-wall carpets which, to the naked eye, matched the color of the red fibers on the tape wrapped around Lualhati's legs. The samples taken were later examed by Dr. Elliot Byall, a chemist with the Federal Bureau of Alcohol, Firearms and Tobacco. He concluded the dye system on the fibers on the tape was indistinguishable from that of the carpet in Bruno's house. In the bedroom the officers found women's clothing, papers bearing the name of Guadalupe Velasquez, two styrofoam wig manikins, and a brown wig. In a hall closet the officers found

an empty rifle case with a stocking tied to the end of it.

Acting on an anonymous tip, the police located Bruno and Velasquez at the Coliseum Motel in Oakland and arrested them on April 4, 1978. In the room the officers found a suitcase containing $12,000 in cash, two rounds of ammunition wrapped in foil, and a loaded 9 millimeter semi-automatic pistol. The ammunition found in Lualhati's car was capable of being fired from that pistol.

Defense Case

The defense introduced witnesses to attack the credibility of Gray. Walter Easley, President and General Manager of the 7-Up Bottling Company, where Gray was employed testified that Gray "was not a trustworthy employee, he was not credible, and we had a great deal of difficulty with him," and that in his opinion Gray was "dishonest and "not

reliable." Steven Farros, who lived with Gray's sister, knew Gray, and saw him almost daily between 1965 and 1968, testified that Gray had a reputation as a "pathological liar." He believed this came about as a result of his addiction to heroin from age 15.

The main defense case was based upon the testimony of appellant and Velasquez, both of whom denied any involvement in Lualhati's death. Bruno and Velasquez lived together in Bruno's home after his release from prison in 1975. Both were regular heroin users, and Bruno also regularly used methadone.

Bruno testified that before going to prison he had saved $100,00 from selling heroin which he had hidden in his house. He never told anyone about the money, including Velasquez. After his discharge from parole, he continued to sell heroin, but only in

amounts sufficient to support his habit. He sold to Arnie Lualhati, whom he met in 1975 in a methadone program. Bruno said they were close friends and shot heroin together.

Both Bruno and Velasquez testified about the New Year's Eve "ripoff." They returned home around 6 p.m., and found six men with guns wearing stockings over their heads. The two were handcuffed behind their backs, their hands and legs bound with heavy tape, and pillowcases were placed over their heads. For five hours the two were tortured in order to learn where the cash was hidden; they were burned, kicked, choked, and threatened with guns or a fatal overdose of heroin unless they talked; Velasquez was twice raped. Bruno never told the men where the money was hidden, but they eventually found it and left.

After the attack, the red LTD and a set of keys to it and the house were missing. Velasquez' brother found the car parked about two and one-half blocks away.

Bruno did not report the incident to the police. Instead, they gathered evidence: blond hairs from stockings left, a roll of tape and the used tape, handcuffs, the sock used as a gag, and large syringes of heroin. Bruno put all this evidence in a bag in the trunk of the LTD because he intended to hire a private investigator.

Appellant suspected Lualhati had been involved in the incident; Lualhati eventually admitted his participation as the look-out, and agreed to help Bruno recover some of the money and to locate the other participants. Lualhati turned over $15,000 in cash to Bruno.

Late in the morning on the day of Lualhati's death, Bruno and Velasquez noticed that the red LTD was missing. They telephoned a few people to see if they could find it. Bruno also called Lualhati who was not at home. Mrs. Lualhati testified that Bruno called and left the message "Tell Arnie I called."

Bruno testified he received an anonymous telephone call about 12:30 p.m. to the effect that "they" had a "snitch," Arnie Lualhati, that he is a dead man and "they" were going to put him in Bruno's car, and they were coming after Bruno next. Ron Leonardo, a friend of Velasquez' who had lived with her family, drove them to Oakland. They brought only a few belongings, some heroin and $14,000 in cash.

The following day they read in the newspapers of Lualhati's death and learned they were suspected. Both

testified that they did not turn themselves in because they were afraid that the police would not believe them. For the next few weeks, they stayed in various hotels in Oakland, although at trial neither could remember any hotel names or addresses. Both testified they went to Los Angeles for a few weeks, returning to Oakland ten days before their arrest.

Bruno admitted throwing the pistol out of the hotel window: he said he purchased it three days earlier for protection purposes.

Both denied any participation in the killing of Lualhati. They both denied any involvement with Gray on February 6, 1978. Bruno denied knowing Gray.

Mrs. Lualhati testified she found a .45-caliber casing on the ledge adjacent to the rear window of the

Cougar which she turned over to the police. It was stipulated that the casing had been fired from the pistol found in the red LTD. Grzybowski testified the heavy damage to the glove-box and the console of the Cougar and the location of the casing indicated that the bullet was fired from inside the car.

Prosecutor's Rebuttal

In rebuttal the prosecution presented testimony relating to an interview of Velasquez' mother, Lupe Roldan, conducted during trial on September 18, 1978, by the prosecutor, John Rowland, James Kassart, [sic] an assistant district attorney, and Officer Sanders. At the interview Ms. Roldan said she did not know anyone named Ron Leonardo, and no one fitting the description of Leonardo given by Velasquez had ever lived in her house. Ms. Roldan told them that two weeks after the homocide, [sic] Bruno

telephoned her and said Valesquez had been present during the incident but she had nothing to do with it. Ms. Roldan said her daughter had told her Bruno had bound Lulhati, put him in the back of the car, and that they didn't mean to kill him, but when he kicked out the trunk he was shot. Ms. Roldan said Velasquez told her they had bound Lulhati to scare him into returning the money. Ms. Roldan was given a prepared copy of her statement, which was read to her. After corrections were made she signed it, as did Sanders and Lassart as witnesses.

At trial Ms. Roldan testified she never talked with her daughter about the Lualhati homocide. [sic] On direct, she denied knowing any person named Ron Leonardo but admitted on cross she knew a Ron "Leonard." Ms. Roldan admitted signing the statement and that it was an

accurate reflection of what she had told the interviewers. But, she said she was intimidated and confused during the interview, and that the sources of some of her information were the media and the preliminary hearing which she had attended.

Ms. Roldan confirmed her daughter was also in the house during the interview, and that afterwards she told her the substance of her statement. She stated Velasquez was upset, and that thereafter they both contacted Bruno's attorney, Mr. Serra and Velasquez' attorney, Mr. Reisman.

Defense Surrebuttal

Velasquez' attorney Reisman testified that he had instructed his client not to talk about the death of Lualhati with anyone. He stated that on September 18, 1978, Velasquez and her mother had come to his office and there

Ms. Roldan indicated she was concerned that the signed statement was not an accurate reflection of what she had said. Ms. Roldan stated that she told the investigators that the basis for her information was what she had seen on television, read in the newspapers and had observed at the preliminary hearing. Ms. Roldan told Reisman she had never talked with her daughters about the homocide. [sic] Ms. Roldan further stated to Reisman that Bruno had told her on the telephone only that her daughter had nothing to do with Lulahati's death, that she was "all right," not to worry and that they were in Oakland. Reisman testified that after he talked with Ms. Roldan, Bruno's attorney came to the office and asked the same questions and received the same answers.

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PROSECUTORIAL MISCONDUCT

Appellant claims he was denied a fair trial because of prosecutorial misconduct, specifically: (1) eliciting from Velasquez and appellant that they were silent after arrest, and using that post-arrest silence in argument to the jury; (2) expressing personal belief in the reliability of prosecution witnesses and in appellant's guilt; (3) attacking the integrity of defense counsel; and (4) referring in argument to facts outside of the record. Each contention is discussed in full below. While we find instances of misconduct, we conclude the errors were harmless beyond a reasonable doubt and thus reversal is not warranted. (Chapman v. California (1966) 386 U.S. 18, 24.)

(1) Eliciting from Velasquez and appellant that they were silent after arrest, and using post-arrest silence in arguing to the jury that the defense was fabricated.

During cross-examination of Ms. Velasquez, the prosecutor elicited, over objection, that she did not speak with the police upon her arrest, that the first person she spoke with about the events was her attorney, and that her just given testimony on direct examination was the first time she ever described the events to either a court of law or the district attorney. Further, he elicited that she had been present at the preliminary hearing, did not testify, and had discussed with her attorney and appellant's attorney the prosecution evidence presented at the preliminary hearing.

During cross-examination of appellant, the prosecutor asked about his activities between the time of the victim's death and his arrest. Over objection, the district attorney asked whether this was the first time he had

testified as to his "story." The district attorney was allowed to elicit from appellant that the first person he told of his "account" was his attorney.

During closing argument the prosecutor pointed out to the jury that Velasquez' memory on direct examination was "uncanny" "except when you get to the point of the event that never really happened." He argued without objection: "She was privy to testimony at a preliminary hearing indicated from the witness at the scene, Mr. Mercado -- it became very evident to all concerned that no one, no one at the scene of the shooting could identify the shooter." After listing the evidence presented at the preliminary hearing: the fibers on the tape on Lualhati's body matching the fibers in the carpet of Bruno's home, the substance of Gray's testimony, the weapon, he then argued, without

objection: "All of that was presented to them at the preliminary hearing. As they testified, the account that they are giving of the events never came out until here in this courtroom when they testified before you. [¶] Opportunity for fabrication was immense -- immense. [¶] You will notice that in their testimony they had an explanation for everything. For every piece of physical evidence they provide an explanation." The prosecutor then proceeded in summation:

> "I would like you to know one fundamental concept before your time here is through as members of this jury panel, and that fundamental concept is this:
>
> There is a law of criminal discovery and the result of that law of criminal discovery is that from the very outset they have it. They have the opportunity to shift through it and analyze it and to determine how to answer it.
>
> It is not a two-way street. The prosecution gets no information

from the defense. So, we see it here in this courtroom --

MR. SERRA: Your Honor, I'm going to object. This is improper argument.

THE COURT: I will sustain the objection. Mr. Rowland, I will permit reasonable latitude in your argument, but I don't think it necessary to go into the criminal procedure process as far as the jury is concerned. If you want to comment briefly in order to make a point, I will permit it but I don't think we have to elaborate on it, so I will sustain the objection.

MR. ROWLAND: You consider that the evidence which you saw presented by the prosecution has been in the hands of the defense since April 27th, the date of the preliminary hearing.

You may also infer that they have had it prior to that time.

At no time was any evidence ever presented by the defense at that preliminary hearing. At no time was the prosecution made privy to any evidence presented by the defense until they said it from the mouths of their own witnesses as they testified here in this court.

MR. SERRA: I will object. That's improper.

THE COURT: I will sustain the objection.

MR. ROWLAND: That was the very first time that the account of the events as related by the witnesses Miss Velasquez and Mr. Bruno were brought to the attention --

MR. SERRA: I object again, your Honor. That is improper argument.

THE COURT: Just a minute, Mr. Rowland. I suggest to you that you confine your argument to the matters to be brought out on your rebuttal on the evidence.

Go ahead.

MR. ROWLAND: And the testimony shows that the very first time we became aware of the account of the defense in this case was when they testified to it on the witness stand here in court before you. You heard it for the first time. We heard it for the first time.

Ladies and gentlemen, defenses of this kind don't just happen.

MR. SERRA: I'm going to object. It's improper argument and I ask that he be admonished and cited for misconduct. Other courts have ruled on this issue and we are on the issue of prejudicial misconduct.

THE COURT: Overruled.

I will permit him to continue.

> MR. ROWLAND: They have had an opportunity to distill it, to sift through it, to analyze, to determine what was of importance and how to answer it; what witnesses to give what answers to it."

The United States Supreme Court in Doyle v. Ohio (1976) 426 U.S. 610, 619 held: "The use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." (Accord, People v. Andrews (1970) 14 Cal.App.3d 40; People v. Gaines (1980) 103 Cal.App.3d 89; People v. Galloway (1979) 100 Cal.App.3d 551.) "After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right." (Id., 426 U.S. at p. 619,

fn. 10.) The unfairness was also noted in United States v. Hale (1975) 422 U.S. 171, 180: "The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the defendant remained silent at the time of his arrest."

Recently the Supreme Court held it does not violate the Fourteenth Amendment to impeach a criminal defendant by use of his pre-arrest silence. (Jenkins v. Anderson (1980) ___U.S. ___ [65 L.Ed.2d 86; 100 S.Ct. 2124, 2130].)

The People contend there is no Doyle error in the examination of appellant because the prosecutor asked only about "the first person" to whom he gave his account rather than asking

whether he spoke to the arresting officers. That view was answered in People v. Galloway (1979) 100 Cal.App.3d 561, 557. "[r]espondent reads Doyle too narrowly." (Id., at p. 557, citing People v. Farris, 66 Cal.App.3d at pp. 389-390; U.S. v. Harp (5th Cir. 1976) 536 F.2d 601, 602, fn. 2; Reid v. Riddle (4th Cir. 1977) 550 F.2d 1003, 1004.) Magic words are not necessary.

Alternatively the People argue appellant "opened the door" to this cross-examination because "[t]he question of when appellant initially related his version of the events, and his failure to go to the police, was first brought out during his direct testimony."[2/] Exclusive reliance is placed on People v. Matthews (1980) 108 Cal.App.3d 793, where the defendant on direct examination

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2. Appellant's direct examination follows:

Footnote 2 Continued:

Q. Now, the first few -- after the first few weeks did you go somewhere else? A. We went down and stayed in L.A. for about two weeks.

Q. Let's talk about now the first two weeks before you went to L.A. Did you call anyone in those first two weeks?

A. I'm pretty sure I phoned Lupe's [Velasquez] mother.

Q. Did you call any of your old friends? A. No, I didn't.

Q. Did you let anyone know where you were?

A. No. I didn't.

Q. Why not? A. Because at that point I was afraid.

Q. Had you found out whether or not Arnie indeed had been killed on the 6th? A. Yes, I did.

Q. How did you find that out? A. Will, next day I bought a newspaper and I read it in the newspaper.

Q. Did you see your name mentioned? A. Yes, I did.

Q. Did you know you were suspects, you and Lupe, the next day? A. Yes, I did.

Footnote 2 Continued:

Q. Did you know the police wanted you and were looking for you. A. Yes.

Q. As early as the next day? A. Yes, I did.

Q. Well, if you hadn't done it, why didn't you just call the police? A. Cops, man, they never believe you. Never.

Q. Never believe what? A. They just never will believe a story.

Q. It is true? A. Yes, it's true.

Q. Why didn't you, after knowing that you were the suspects, why didn't you just go to Mexico or go to Canada? Why didn't you just flight forever? A. Because I had no reason to leave here.

Q. Why did you stick around over there in Oakland, right next to San Francisco? A. Well, I was going to see what was going to turn out. I figured the people that were involved would get arrested somehow. I don't know.

Q. Why did yo go to L.A.? A. Well, I figured we stayed in Oakland too long and figured we were getting hot, so we better take off.

raised the subject of his post-arrest silence. The court concluded "[t]he questioning and comments of the People, following Matthews' invitation to explore the subject were proper [citation]. Moreover, no objection was made to the comments during argument [citation]." (Id., at p. 795.)

Cross-examination is proper "upon a matter that is within the scope of the direct examination of a witness." (Evid. Code, §761.) Here direct examination elicited appellant's admission he

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Footnote 2 Continued:

Q. Well, were you afraid of being being captured? A. Sure I was.

Q. Were you afraid of the five other persons finding you that had been involved in the robbery or rape or ripoff?

A. Sure.

Q. How did you get down to Los Los Angeles? I recall we took a night coach, bus, to L.A.

had phoned Ms. Velasquez' mother. Questioning appellant as to whether he told her of the trip to Los Angeles was therefore within the scope of direct examination.

Nevertheless reference during cross-examination to the fact that appellant had never before testified about his version of the events was clearly error which was compounded when the prosecutor made that exercise of constitutional right a major item of comment in closing argument. Griffin v. California (1965) 380 U.S. 609, 615 held it violative of the Due Process Clause for either the prosecution or the court to comment upon the defendant's failure to testify. (See also People v. Modesto (1967) 66 Cal.2d 695, 710-711 [cert. den. 389 U.S. 1009; People v. Vargas (1973) 9 Cal.3d 470, 475.) A criminal defendant has no obligation to testify

or to otherwise present an affirmative case at the preliminary hearing, and the practice of not offering the testimony of the defendant at the preliminary hearing is well-known and frequently adhered to. (People v. Conover (1966) 243 Cal.App.2d 38, 49.) It was error for the prosecution to comment on the defendant's failure to testify at the preliminary hearing.

Similarly, it was misconduct for the prosecutor to question Ms. Velasquez about her post-arrest silence. Although at trial Velasquez was not a codefendant, she had been charged in the original indictment. These charges were not dropped until the preliminary examination had been completed. Thus, Ms. Velasquez was not the ordinary defense witness who merely fails to come forward with her version prior to trial. She, as defendant, had an absolute right to

remain silent upon arrest and at the preliminary hearing. She exercised that privilege by remaining silent, and in the context of this case it was denial of due process for her testimony to be impeached on the ground of her post-arrest silence.

It is perfectly proper for the district attorney to point out to the jury that appellant and Velasquez were present during the preliminary examination where the substance of the prosecution's case against them was presented, and argue from that that the defense had the opportunity to create a defense. However, it is improper for the district attorney to comment on their post-arrest silence or exercise of the privilege not to testify at the preliminary examination.

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(2) Expression of personal belief in the reliability of prosecution witnesses and in the guilty of defendant.

Appellant contends the prosecutor committed misconduct in expressing personal belief that the prosecution witnesses were truthful, that defendant and Velasquez were fabricating, and that defendant was guilty. Misconduct on this ground is not demonstrated.

The prosecutor properly argued to the jury that based upon the evidence adduced at trial he believed the defendant guilty of the charged crimes. This is a far cry from the situation condemned in People v. Bain (1971) 5 Cal.3d 839, 848, where there was substantial danger the jurors would interpret a statement as being based on information known to the prosecutor alone. Similarly, the prosecutor's suggestion that appellant and Velasquez were lying

would be improper only if he conveyed the impression he had information on the subject in addition to the evidence adduced at trial.

Further, no objection was offered by defense counsel; thus, under People v. Green (1980) 27 Cal.3d 1, 34, the alleged misconduct cannot be raised on appeal if a timely objection and admonition would have cured the alleged error. Here, had there been objection, the trial court could have made clear to the jurors the prosecutor had no information in addition to what they had heard and seen.

Similarly, the prosecutor's comments upon the truthfulness of the prosecution's witnesses were not objected to by defense counsel. It cannot be said that a timely objection and admonition would not have cured any error.

(3) Attacking the integrity of defense counsel.

During closing argument, the prosecutor first recited in detail the statement Ms. Roldan made to him and Inspector Sanders, which he declared to be the "truth." He then argued her repudiation of the statemtns at trial was a result of her consultation with Ms. Velasquez' attorney and the defendant's counsel. No objection was made.

Later in closing argument, the prosecutor stated: "Ladies and gentlemen of the jury, think of the events that occurred when Guadalupe Velasquez' mother came here to this courtroom to testify. Have you ever seen anything to compare with the machinations? Talk about puppets, talk about malleable, talk about pressure! [¶] What kind of pressure did they exert upon her? What

did they tell her was going to happen to her daughter -- and there is no question about the fact that she was concerned about her daughter. Concerned about her daughter and her connection with a murder case. No doubt they told her that her daughter had testified opposite to what she had said in her statement."

"MR. SERRA: I object to that. There's no evidence of that.

"MR. ROWLAND: I think a reasonable inference can be drawn --

"THE COURT: Overruled, this is argument."

". . . It was only later, in the hands of those lawyers who talked to her that night, and she was here with her daughter the following day, they talked to her. You saw the lawyer who represented her talking to Mr. Serra in the hallway, talking to Mr. Serra in the courtroom. What do you suppose they

were so concerned about?"

This unsupported suggestion that defense counsel tampered with the testimony of Ms. Roldan is misconduct. There was no evidence to support the contention that defense counsel tampered with the testimony of Ms. Roldan, nor is impropriety a reasonable inference from the fact that she consulted with defense counsel.

During defense counsel's summation he referred to the victim and appellant's relationship as the "Judas syndrome" in that the victim had betrayed appellant's friendship. During cross-examination appellant had testified that the money found in his possession during the Oakland arrest was paid to his attorney. The prosecutor argued during summation: "There is a Judas syndrome at work here and the criminal justice system is the cathedral.

And it's been a terrible sight to see it sullied the way it has been during this trial with the most blatat lies. But to complete that Judas syndrome -- the defense is the Judas in this case, and they have betrayed that system and there are 30 pieces os silver, that have betrayed that system and there are 30 pieces of silver, or that $12,000 given over by the defense to his counsel."

Defense counsel's objection was sustained and the jury admonished to disregard the prosecutor's comments.

There can be no doubt that the prosecutor's insinuation that defense counsel was participating in deception for profit was misconduct. Although we recognize that defense counsel used questionable tactics during trial, the district attorney, as a representative of the People, is not entitled to retailate in kind. (People v. Talle (1952) 111

Cal.App.2d 650, 677.) Nonetheless, we conclude that the trial court's admonition to the jury coupled with the later instruction that statements of counsel are not evidence (CALJIC No. 1.02) cured this misconduct.

(4) Reference to facts outside of the record.

The People concede it was misconduct for the prosecutor to refer in closing argument to a memorandum not introduced into evidence. (People v. Bolton (1979) 23 Cal.3d 208, 212-213.) We reject the People's contention that the misconduct was cured by the court's admonition to the prosecutor to confine his argument to the evidence before the court.

Effect of Misconduct

What remains is to evaluate the effect of these instances of prosecutorial misconduct: the improper

cross-examination regarding post-arrest silence, the comments thereon in closing argument, the improper attack on the integrity of defense counsel, and the improper reference to facts outside of the record.

In connection with the improper cross examination on post-arrest silence, it is clear the Chapman v. California, supra, 386 U.S. 18, 24 standard of review applies. (See People v. Galloway (1979) 100 Cal.App.3d 551, 559-560; People v. Gaines (1980) 103 Cal.App.3d 80, 96.)

The traditional standard for judging the effect of prosecutorial misconduct is whether it is "reasonably probable that a result more favorable to defendant would have occurred had the district attorney refrained from the comment attacked by the defendant." (People v. Beivelman (1968) 70 Cal2d 60, 75; People v. Strickland (1974) 11 Cal.3d

946, 955.) Recently, in People v. Bolton (1979) 23 Cal.3d 208, 214-215, footnote 4, the Supreme Court strongly emphasized that a prosecutor's closing argument could be so important as to create federal constitutional error under the Chapman test. Given the fact that the prosecutor's closing remarks accentuated the erroneous cross-examination, it appears proper to test the errors jointly through the application of Chapman.

On review of all the evidence in this case which has been set forth in detail earlier in this opinion we conclude the errors were harmless beyond a reasonable doubt.

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MOTION TO SUPPRESS

Appellant moved pursuant to section 1538.5 to suppress evidence taken from his house under an unsigned search warrant.[3]/

At the hearing on the motion it was stipulated that if the magistrate, were called, she would testify as follows:

> "That on February the 8th, 1978, she was a Municipal Court judge;

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3. The Penal Code specifies the procedures for issuance and execution of a search warrant. Section 1523 defines a search warrant as "an order in writing . . . signed by a magistrate." Section 1526, subdivison (a) provides the "magistrate may, before issuing the warrant, examine on oath any person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing, and cause same to be subscribed by the party or parties making the same." Section 1528 subdivision (a) provides that upon a showing of probable cause the magistrate "must issue a warrant signed by him. . . . "

"That at about 3 o'clock on that afternoon, Inspector Rotea Gilford, then of the Homicide Detail of the San Francisco Police Department, approached her in her chambers in this particular building, the Hall of Justice;

"At that time, Inspector Gilford sought two distinct warrants, one a search warrant for the premises located at 468 Amherst Street here in San Francisco; the second and actually third -- second and third warrants would be arrest warrants for one Daniel L. Bruno and one Miss Velasquez -- her first name escapes me for the moment;

"At any rate, the affidavit and those two warrants, the arrest warrants and the search warrants were exactly the same;

"The magistrate read and considered the affidavit;

"That she swore Inspector Rotea Gilford with reference to the affidavit:

"That he was sworn -- that things that he stated in the affidavit as probable cause were in fact true; he; Inspector Gilford, did in fact sign the affidavit;

"[That the magistrate] signed the arrest warrants for Daniel Bruno and Miss Velasquez;

"[That the magistrate] also affixed in her own handwriting the date,

> that of February the 8th, 1978, and she affixed that below the signature of Rotea Gilford on the affidavit for the search warrant. . . ."

It is appellant's sole contention that the failure of the magistrate to sign the warrant necessarily invalidated the search.

Primary reliance is placed on Bowyer v. Superior Court (1974) 37 Cal.App.3d 151, where petitioner attacked a search purportedly conducted under authorization of Penal Code section 1528, subdivision (b). There the magistrate had taken an oral statement under oath which complied with the provisions of subdivision (b) of section 1526 and had authorized and ordered the affiant to affix the magistrate's name to a search warrant to be filed with the court. No such warrant was prepared or so signed prior to the search. Instead on the day following the search the magistrate

signed a form of search warrant and wrote "Dated April 23, 1973 nunc pro tunc as of April 22, 1973." In issuing a peremptory writ for the suppression of such evidence as was seized under the authority of the alleged telephonic search warrant, this court per Rattigan, J., observed:

> "The language of sections 1523 and 1528, relative to the warrant 'commanding' the addressed peace officer to act, is couched in prospective terms: both sections thus indicate that the officer is authorized to act pursuant to the warrant only after it exists in writing (§§ 1523, 1528) and (1) has been 'signed' by the magistrate (§ 1523; § 1528, subd. (a)) or (2) his name has been 'signed' to a duplicate original thereof pursuant to his oral authorization (§ 1528, subd. (b)). The prospective language imports that a written instrument in one form or the other must be in existence before a search may be conducted."

(Bowyer, supra, at p. 163, fn. omitted, emphasis added.)

Bowyer in both its reasoning and its facts thus involved a situation

where no written process whatsoever existed at the time the searches were made. As such, it does not control this case where a search warrant did exist, was carried by the officers executing the search, but was not signed by the magistrate.

Our conclusion that Bowyer is inapposite mirrors the same determination made in Stenberg v. Superior Court (1974) 41 Cal.App.3d 281 and People v. Superior Court (Robinson) (1977) 75 Cal.App.3d 76. In Sternberg, the magistrate admittedly forgot to sign the search warrant. That defect was discovered by a police officer shortly after the warrant was executed. Hen then returned the warrant to the magistrate who signed it. In a carefully precise opinion holding the warrant legally sufficient, Justice Sims remarked:

> "The fact remains that here there was clear and convincing evidence that the magistrate had determined that there was probable cause and had authorized the search and seizure. No one's position was changed in reliance on the omission of the signature and the defect was promptly cured."

In similar fashion the court hearing the 1538.5 motion (hanlon, J.) here here made a careful analysis of Sternberg and People v. Superior Court (Robionson) and then determined:

> ". . ."the evidence is clear and convincing here that the magistrate swore the affiant, the affiant signed at least one of the affidavits, that the magistrate found reasonable and probable cause to issue the warrant, and that the magistrate intended to sign the search warrant, and did indeed sign the arrest warrant based on the same information, that the officer was unaware of the lack of the signature at the time of the execution, and finally, the final factor is that the householder did not notice [the lack of a magistrate's signature] because [he] was not present at the time the search was issued.
>
> "So therefore, the court concludes that based on those five factors that the Court has just found to exist by clear and convincing

> evidence, and coupled with the inference that you may take, that is, if the magistrate did sign the Return indicating that she at least was aware of the existence of the warrant authorized by her -- that's the inference the Court takes from that. Based on those factors, then, the Court will deny and does deny the Motion to Suppress the Evidence under 1538.5."

Denial of the Motion to suppress was proper.

SENTENCING

On both the murder count (Count I) and the kidnapping count (Count II) the jury found appellant was armed with a firearm (§ 12022, subd. (a)) and had used a firearm (§ 12022.5). Appellant was sentenced on both findings on both counts. The People concede the section 12022 subdivision (a) findings must be stricken as possession of a firearm is necessarily included in the finding that a firearm was used. (People v. Wischemann (1979) 94 Cal.App.3d 162, 175-176.)

The judgment is modified by striking all reference to section 12022 subdivision (a) on Counts I and II. As modified, the judgment is affirmed.

Poche, J.

I CONCUR:

Rattigan, Acting P.J.

People v. Bruno

1 Crim. 18980

I concur.

There was no misconduct by the prosecutor in relation to the witness Velasquez. In all other respects I agree with the majority opinion.

Christian, J.

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ORIGINAL

ORIGINAL

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

NO. 83-1571

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DANIEL J. McCARTHY, Director
California Department of Corrections,
and PAUL J. MORRIS, Warden,
California State Prison at Folsom,

Petitioners,

v.

DANIEL L. BRUNO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

NO. 84-1571

DANIEL J. McCARTHY, Director
California Department of Corrections,
and PAUL J. MORRIS, Warden,
California State Prison at Folsom,

Petitioners,

v.

DANIEL L. BRUNO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
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INTRODUCTION

For purposes of this brief, respondent adopts the recitations in the petition for writ of certiorari respecting the opinion below, the jurisdiction of this Court, the constitutional and statutory provisions involved, the statement of the case, and the abbreviations designating the record.

STATEMENT OF THE FACTS AT TRIAL

The opinion of the California Court of Appeal contains a detailed statement of facts (Petition for Certiorari, Appendix C, pp. 2-19). For purposes of this brief respondent adopts that statement except to the extent, as demonstrated

below, that it omits some facts and misstates others which strengthened the defense case.[1]

The opinion implies that the only witnesses called by the defense to impeach William Gray were Walter Easley and Steve Farros (Appendix C, pp. 10-11). However, the defense also called Dennis Holmes, one of the Milpitas police officers to whom Karin King reported the conversation between Gray and respondent (RT 387-390; see also RT 352-57.) Officer Holmes got the impression from Ms. King that Gray had told her that he had been kidnapped at gunpoint by a Latin male, i.e., respondent, and a Latin female, i.e. Lupe. (RT 389-390, 396, 399.) Holmes was not made aware that the suspects were friends of Gray. (RT 397-398.) Thus, Holmes' testimony contradicted Gray's testimony that Gray was friends with respondent and Lupe Velasquez and that he had offered them the ride to San Jose. (RT 98-99, 204-205.)[2]

The opinion also implies that the only reason that respondent and Lupe fled was to avoid arrest by the police, whom they assumed would not believe them (Appendix C, pp. 14-15). However, respondent testified that he was also eluding the killers of Arnie Lualhati. (RT 612; see Appendix C, p. 31, fn. 2.)

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1. Each of the facts recited below was stated in the opening brief (pp. 10-18) and in the petition for rehearing (pp. 2-3) filed in the California Court of Appeal, the petition for hearing (pp. 2-3) filed in the California Supreme Court and in the petition for writ of habeas corpus (pp. 39-41) filed in the United States District Court. (ER, Tabs 1, C.)

2. The opinion states that Steve Farros saw Gray "almost daily between 1965 to 1968". This apparently is a typographical error. Farros testified that he saw Gray on almost a daily basis while he was living with Gray's sister, which was from 1965 to April 1978. (RT 415-417.)

The opinion also does not mention the defense's affirmative denial or explanation of some of the physical evidence against petitioner. Neither respondent nor Lupe recognized the rifle found in the Cougar. (RT 594, 551.) Respondent did not recognize the rifle case found in his home, but acknowledged the possibility that it was left behind by the intruders on New Year's Eve and then inadvertently placed in a closet by him when he and Lupe cleaned up afterward. (RT 635.) The sock used to gag Arnie Lualhati and the sock tied around the rifle case both are black and therefore appear to match, but the designs inside them do not match. (RT 595.)

Finally the opinion implies that the reason Mrs. Lupe Roldan contacted the defense attorneys was that her daughter Lupe Velasquez was upset after the interview (Appendix C, p. 18). However Mrs. Roldan testified that she called the defense attorneys because she was concerned that her signed statement indicated her daughter as the source of her information. (RT 668-669, 660-662.)[3/]

SUMMARY OF ARGUMENT

A determination by a state trial or appellate court that prosecutorial misconduct was cured by admonitions and instructions to the jury is a conclusion of law and therefore not to be presumed correct by a federal court on habeas corpus review under 28 USC 2254(d).

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3. Mrs. Roldan also testified that she did not think of Ron Leonard when asked about Ron Leonardo because of the difference in pronunciation between the Anglicized and Spanish versions of his last name. (RT 672-675.)

ARGUMENT

During closing argument at the state court trial in the instant case, the prosecutor attacked the integrity of defense counsel in two ways. First, he accused counsel of tampering with witness Mrs. Lupe Roldan. The state trial court overruled the objection to the attack. (Appendix C, pp. 37-39.) The state Court of Appeal found the attack to be without basis in fact and thus misconduct. (Appendix C, p. 39.) The state appellate court did not conclude that the misconduct was cured by any admonition or instruction to the jury. Rather, it simply determined that the unwarranted attack was harmless beyond a reasonable doubt. (Appendix C, pp. 42-43.) It offered no specific reasons for that conclusion.

The second attack was an accusation that defense counsel fabricated the defense for profit. The state trial court sustained an objection and admonished the jury to disregard the remark. (Appendix C, pp. 39-40.) The next morning, counsel for respondent moved for a mistrial on the ground that the harm from the misconduct was incurable. (RT 753-754.)[4/] The trial court took no evidence on the motion, but rather denied it on the ground "the comments on fees, et cetera, . . . in [the court's] judgment resulted in no prejudice." (RT 754.) Later that morning, the court read the jury a set of formula instructions. (RT 762-787.) Included among them was a general instruction not to treat statements of counsel as evidence; the instruction did not refer to any particular statement of either counsel. (RT

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4. In relevant part, counsel for respondent argued for a mistrial as follows: " . . . because of his continual . . . accusation of me contriving a defense, I believe that a mistrial is the only cure, that is, there is no way that the damage done by such an argument can ever be effaced." (RT 754.)

763.)[5] The state Court of Appeal held that the fabricatio
charge was misconduct, but that it was cured by "the trial
court's admcnition to the jury coupled with the later instr
that statements of counsel are not evidence." The court did
not explain how it reached that conclusion. (Appendix C,
pp. 40-41.)

The United States District Court agreed with the
state appellate court that both attacks on defense counsel we
misconduct. It expressly disagreed with the Court of Appeal
that the second attack was cured by admonition and instruction
(Appendix B, p. 28.) It found the attacks prejudicial,
reasoning as follows:

> "The right to counsel is a basic right that must be zealously guarded. As the court stated in McDonald, "[c]omments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of this defense cannot be considered harmless error. . . Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error." (id., at 564). We view the comments as compounding the other improper comments which implied that petitioner fabricated his defense. The

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5. In its entirety, the instruction was:

> "The attorneys for the parties have of course taken active roles in the trial of this case which has included the making of opening statements, questioning witnesses, making objections and finally arguing the case to you before you have commenced your deliberations.
>
> "Remember that the attorneys are advocates and not witnesses, and since it is your duty to decide the case solely upon the evidence, you must not consider as evidence the statement of any attorney made during the trial, except if the attorneys have agreed or stipulated to any fact, or any fact has been admitted by any attorney. Then it will be your duty to regard such fact as being conclusively proved as to the party making the stipulation or the admission, without the necessity of any further evidence of that fact." (RT 763.)

> government has not established that these comments are harmless beyond a reasonable doubt." (Appendix B, p. 29.)

Earlier, the district court stated from:

> "a review of the record . . . the case was a close one. Petitioner was not identified by either of the witnesses to the shooting. The defense impeached the credibility of the chief government witness linking petitioner to the crime, William Gray, as well as having an explanation for most of the government's circumstantial evidence." (Appendix B, p. 19.)

The Ninth Circuit Court of Appeals began its opinion by noting that respondent's conviction had been "affirmed by the California courts." (Appendix A, p. 2.) It expressly agreed with the district court that both attacks on defense counsel "were improper and not harmless beyond a reasonable doubt." (Appendix A, pp. 2-3.) The Court of Appeals did make passing reference to the state trial record. (Appendix A, p. 5.) And, its conclusion that the improper comments were calculated to impute guilt to respondent echoed similar determinations of the California Court of Appeal (Appendix C, p. 40)[6/] and the district court (Appendix B, p. 28).

In sum, the state trial court concluded the second, but not the first, attack on the integrity of defense counsel was misconduct. Thereafter, the California Court of Appeal, the United States District Court, and the Ninth Circuit

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6. The California Court of Appeal held: "There can be no doubt that the prosecutor's insinuation that defense counsel was participating in deception for profit was misconduct." (Appendix C, p. 40; emphasis added.) In context, the person with whom defense counsel was being accused of conspiracy was obviously his client.

Court of Appeals each independently determined that both attacks were misconduct. The only disagreement among the reviewing courts has been about the prejudice from the errors.

Petitioners do not have the temerity to argue to this court that the prosecutor was justified in his vicious attacks on defense counsel. Rather, they argue now for the first time that 28 U.S.C. 2254(d) required the federal courts to presume the correctness of the state appellate court rulings that some of the misconduct was cured by admonitions and instructions to the jury.

On its face, 28 U.S.C. 2254(d) accords a presumption of correctness of state court findings only to "the merits of a factual issue." Thus, the statute contemplates deference to the state court only when the federal court has "any disagreement as to the facts" or concludes that the state court "factual determinations were not supported by the record." (Sumner v. Mata (1982) 455 U.S. 591, 597; Sumner v. Mata (1981) 449 U.S. 539, 549.)

The statute does not govern a pure question of law or a mixed question of law and fact. (Marshall v. Lonberger (1983) _____ U.S. _____ [74 L.Ed.2d 646, 657, 103 S.Ct. 843]; Sumner v. Mata, supra, 455 U.S. at p. 597.) Whether federal constitutional error is harmless beyond a reasonable doubt is a question of law to which the presumption of correctness does not apply. (Rushen v. Spain (1983) _____ U.S. _____ [78 L.Ed.2d 267, 274, 104 S.Ct. 453]; accord, Hinman v. McCarthy (9th Cir. 1982) 676 F.2d 343, 350, fn. 3.)

In California, as in most jurisdictions, a juror may not testify concerning the effect of an alleged error in influencing him to assent or to dissent from the verdict or concerning the mental processes by which the verdict was

determined. (Cal. Evidence Code § 1150(a);[7/] e.g., People v. Ozene (1972 27 Cal.App.3d 905, 914 [104 Cal.Rptr. 170] [juror may not testify to coercive effect of allegedly erroneous jury instruction]; see Rushen v. Spain, supra, 78 L.Ed.2d at p. 274, fn. 5.)

Notwithstanding these authorities, petitioners complain that neither federal court in the instant case gave any deference to the state appellate court's conclusion that admonitions by the trial judge obviated any harm from the prosecutor's statements (i.e., the charge of fabrication for profit). (Petition for Certiorari, p. 29.) In accordance with California law, however, no evidentiary hearing was held on the subjective effect of the misconduct or the admonitions, given that they were directly related to the specific issues of credibility before the jury. (Contrast Rushen v. Spain, supra.) Thus, the conclusion that the error was cured required no findings of fact. Under state statute, it was a question of law. Accordingly, that conclusion was no different than a ruling that the error was harmless. Indeed, petitioners themselves seem to equate the two in complaining

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7. California Evidence Code section 1150(a) provides:

> "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental process by which it was determined." (Emphasis added.)

that "a federal court should not be allowed to simply reject out of hand the state court's finding of harmless error." (Petition for Certiorari, p. 27.)

Upon analysis, the question petitioners present already has been resolved by this court against them. The question concerns only one of the two attacks on the integrity of defense counsel. Petitioners give this court no reason to believe that the Ninth Circuit's disposition would be any different even if the question were resolved in their favor. And, the state court findings to which petitioners would now have the federal courts defer are conclusory in form. No useful purpose would be served by granting the petition.

Petitioner's other complaints in passing about the federal courts in this case are refuted on the face of their decisions.

Neither court rejected "out of hand" the state appellate court's determination that admonitions obviated any harm from the charge of fabricating the defense (Petition for Certiorari, p. 29). As noted above, the district court reasoned that the error was fundamental in nature, and struck at the core of the defense in a close case. (Appendix B, pp. 28-29, 19.) The Ninth Circuit expressed its agreement with the district court and stressed the fundamental nature of the error. (Appendix A, pp. 2-9.)

Neither federal court made a factual finding at odds with that of a state court. Thus, neither was required under 28 U.S C. 2254(d) to state it was deferring to state findings of fact.

Both courts expressly determined that the misconduct was not harmless beyond a reasonable doubt. Thus, neither court relied on non-existent supervisory powers over state courts to grant habeas corpus relief.[8/]

Both courts based their finding of prejudicial error on a review of the whole record. The district court expressly stated that it had. (Appendix B, p. 18.) The Ninth Circuit cited Chapman v. California (1967) 386 U.S. 18 and United States v. Valle-Valdez (9th Cir. 1977) 554 F.2d 911, 915, fn. 5-8. Since Chapman this Court has made clear that a court reviewing constitutional error has the duty to consider the record as a whole to determine whether it is harmless beyond a reasonable doubt. (See United States v. Hasting (1983) _____ U.S. _____ [76 L.Ed.2d 96, 106, 103 S.Ct. 1974], citing Harrington v. California (1969) 395 U.S. 250.) The Ninth Circuit presumably was aware of that duty and faithfully performed it. (See Sumner v. Mata, supra, 449 U.S. at p. 549.) Its citation to Valle-Valdez reinforces that conclusion, since

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8. There is nothing distressing about the Ninth Circuit's criticism of the comments in the prosecutor's opening argument. Those comments had been assigned as misconduct in the opening brief (p. filed in the Court of Appeal (ER; Tab C.) That court reached the merits of the argument despite the lack of the objection. (Appendix C, pp. 37-39.) There was thus no ban to their consideration on federal habeas corpus review. (Bradford v. Stone (9th Cir. 1979) 594 F.2d 1994, 1996, fn. 2.) Petitioners did not raise any objection to assignment of those comments as misconduct in the petition for writ of habeas corpus. (ER, Tab 1, p. 34; ER, Tab 4.) They cannot now be heard to make such an objection. (Jenkins v. Anderson (1980) 447 U.S. 231, 234, fn. 1.) In any event, the comments in the opening argument place in context those made in the closing argument to which an objection was made.

that case cites Harrington in its discussion of prejudice. Further, the Ninth Circuit did refer in passing to the record. (Appendix A, p. 5.)

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CONCLUSION

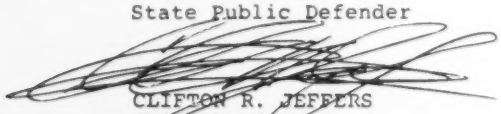
The prosecutor at respondent's trial resorted to flagrant misconduct in order to obtain a conviction. The state appellate court affirmed the conviction without articulating reasons why the misconduct was harmless beyond a reasonable doubt. Both federal courts, on the other hand, articulated sound reasons for concluding the misconduct was prejudicial.

For the first time in this court, petitioners argue that the state court's determination of harmless error was really a finding of fact, rather than law, to which the federal courts should have deferred. The petition for writ of certiorari thus presents no real issue for this Court to resolve. The affirmance of the order granting habeas corpus relief should remain undisturbed.

DATED: June 7, 1984

Respectfully submitted,

FRANK O. BELL, JR.
State Public Defender



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Chief Assistant,
State Public Defender

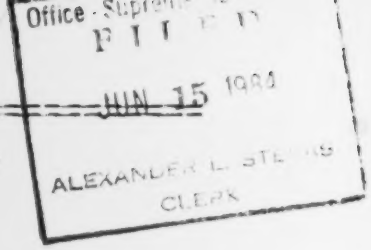
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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 83-1571

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ARGUMENT

In his Brief in Opposition respondent states: "Petitioners do not have the temerity to argue to this court that the prosecutor was justified in his vicious attacks on defense counsel"

(Brief in Opp. at p. 7). We have never conceded that the state prosecutor in this case was guilty of misconduct, and did not do so in the Petition for Writ of Certiorari. Rather, we assumed arguendo in light of the state court findings that there was misconduct and focused our argument on the manner in which federal courts on habeas corpus should review such claims.

Approximately three weeks before our petition was filed, this Court granted certiorari in United States v. Young, No. 83-469, cert. granted February 21, 1984, ____ U.S. ___, 104 S.Ct. 1271, 79 L.Ed.2d 676. That case involves an otherwise improper closing argument from the prosecutor, prompted by the defendant's final argument. Among the questions presented is whether the prosecutor's argument was permissible as

a response to the defendant. 52 L.W. 3596.

As noted in our petition, the comments by the state prosecutor at issue in this case all arose in his closing argument and were prompted by respondent's argument. (Pet. at 14-15). We submit that this case presents issues similar to those raised in United States v. Young, and that they could appropriately be reviewed together. As an alternative to full plenary review, we respectfully request that the petition be held pending a decision in Young. Should this court uphold the prosecutor's actions in Young it would be appropriate to remand this case to the Ninth Circuit to decide whether any federal rights were implicated by the state prosecutor's argument. Should the court reject the government's contentions in Young, it could then consider

the specific issues raised in our petition.

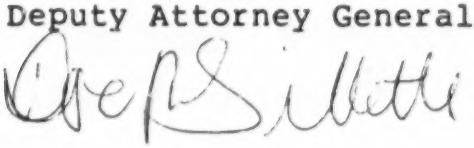
CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, we respectfully submit that certiorari be granted, or that the case be held pending determination of United States v. Young, No. 83-469.

DATED: June 14, 1984

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